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## Will the SAFE Banking Act persuade banks to open their doors to cannabis clients?

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“Cash only, please” signs are prevalent in California marijuana dispensaries and businesses. It is estimated to be a North American industry worth \$16 billion, yet much of California’s share of the marijuana bounty is exchanged, stored and shuttled around in cold, hard cash under armed guard.

Even though California legalized marijuana back in 2016, financial institutions routinely refuse to bank the cannabis industry. Marijuana remains illegal under federal law, thus, under the Bank Secrecy Act, it is illegal to accept funds generated through the sale of marijuana. Banks would be, in effect, putting their FDIC membership on the line. Theoretically, if an agency did enforce the law, the bank would lose not just its cannabis clients, but all its clients. Along with this potential catastrophic outcome, the marijuana industry is perceived as inherently high risk with an alphabet soup of agencies having regulatory authority in one capacity or another, including the DEA, FDA, USDA, DOJ and all their state counterparts. Banks are understandably concerned about facilitating the financial affairs of participants in an industry where the favorability can shift with the political tide.

Without even a simple checking account, cannabis businesses deal with customers, suppliers, landlords, and even the IRS in cash only. It is inconvenient for customers who are so used to POS systems. It is dangerous for dispensaries who should protect their staff, patrons, product and proceeds from robbery. It complicates financial accountability.

Bloomberg Law recently reported there are only around 40 financial institutions currently working with cannabis-related businesses. Clients are often required to pay additional fees to cover the cost of due diligence and FinCEN federal reporting. California considered launching a state-backed bank for marijuana business-



New York Times News Service

es, but the concept was deemed too expensive for California taxpayers, too risky for the state, and unlikely to succeed. State Treasurer John Chiang’s working group stated “[t]he only effective long-term solution involves legislative and regulatory changes at the federal level to allow the legal banking of cannabis-related funds.”

That relief may come soon through the federal SAFE Banking Act.

The SAFE Banking Act, in its latest iteration, aims to provide a safe harbor for financial institutions when providing services to commercial cannabis operations. If passed and signed into law, financial institutions will be able to provide financial services to “cannabis-related legitimate businesses,” invest associated income, and hold a business’s real estate and equipment as collateral for a loan without fear of liability under federal law. On the other side of the coin, federal regulators will not be able to prohibit, penalize or discourage banks from working with these cannabis-related legitimate businesses or take any adverse action on loans made to such businesses solely because of their involvement with cannabis in compliance with state and local law.

This bill has been around for the past six years, but has recently picked up speed. It cleared the U.S. House Committee on Financial Services and is on track for a vote in the House of Representatives in the next few weeks. Bloomberg Law reported that more than 40 different groups are actively lobbying on the issue including labor unions, credit unions and the American Bankers Association. The current 167 predominantly

Democratic sponsors of the bill hope that this will provide banks with confidence they need to be able to offer services to these businesses without falling afoul of the Bank Secrecy Act.

Despite this support, and while likely to pass in the House, industry insiders believe that Senate approval is far less likely.

This legislation may aim to remove regulatory teeth of the various agencies that oversee banks, however, it does not slay the dragon. Marijuana remains a Schedule I drug under the Controlled Substances Act. FinCEN federal reporting would also remain in place. Banks dealing with clients in this space must file a “Marijuana Limited” suspicious activity report. This report is accompanied by intensive due diligence to ensure that no other suspicious activity has been identified.

At the core of the act is the class of business it seeks to protect: cannabis-related legitimate businesses defined as those that operate pursuant to a state or local law. In states like Washington and Oregon with well-regulated cannabis industries, banks, under their own initiative, have already started to provide services to marijuana businesses. However, even if the SAFE Banking Act passes, banks may continue to be wary in states like California where the regulatory system is still being built out.

Under guidance issued by various California regulatory authorities, products containing hemp-derived CBD that have not been approved by the FDA have not been legalized. The SAFE Banking Act may not, therefore, aid businesses operating in this space. A business that operates across multiple jurisdictions might also struggle to find a bank willing to do the due diligence leg work to determine if it is legitimate in every state, county or city in which the business operates. The patchwork of state and local law that currently exists can be uncertain, confusing and politically complex. In short, the SAFE Banking Act may not do enough to create the confidence bankers need to embrace

the cannabis industry.

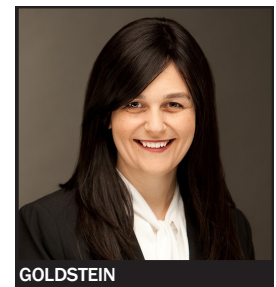
Thus, even if the SAFE Banking Act passes, clients whose business involves the production, processing or sale of cannabis in any form need experienced counsel who have a strong grasp of the quickly developing regulatory environment on federal, state and local levels. Good counsel can help reduce the risk inherent in the cannabis industry and facilitate the compliance required to help a client find the necessary financial services.

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